



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE NO. 1199 OF 2017

LEONARD OSEME KARANI.....CLAIMANTS

VERSUS

SUNFLAG TEXTILE & KNITWEAR MILLS LIMITED....RESPONDENT

RULING

Background

1. The application before the Court is the Respondent's Notice of Motion dated 18.12.2018 seeking the following orders:

- a) Leave be granted to the applicant to file Notice of Appeal out of time.
- b) The order dated 22.11.2018 directing the suit to proceed by formal proof be stayed.
- c) Court file No. 1/99 of 2017 be reconstructed.

2. The Application is supported by the affidavit sworn by the defence counsel Professor Eshiwani Ashubwe on 18.12.2018 and the grounds set out on the body of the motion. In summary the Applicant contends that she was aggrieved by the order of this Court directing the suit to proceed by formal proof and drew the Notice of Appeal dated 10.12.2018. However, her effort to file the Notice of Appeal was thwarted by the disappearance of the Court file from the registry. That her counsel wrote to the Court Registry and even called the claimant's counsel by phone and he also confirmed that the file could not be trace in the registry. She contended that she should not be blamed for administrative failures of the Court and further contended that unless the orders sought are granted, the intended Appeal will be rendered nugatory.

3. The claimant opposed the application by filing the Notice of Preliminary Objection dated 19.12.2018. In brief, the claimant contended that the application is bad in law, misconceived, vexatious, res judicata and intended to delay the finalization of the suit.

4. The application was disposed of by written submissions. The applicant submitted that the claimant never filed any replying affidavit to the motion and as such, her explanation and circumstances remain unrebutted. She therefore submitted she is entitled to the leave to file an appeal out of time.

5. She argued that on 21.11.2018, the Court issued an order that the suit shall proceed by formal proof because the applicant had failed to file defence within the prescribed time. She further contended that her effort to file Notice of Appeal dated 10.12.2018 was prevented by the disappearance of the Court file from the registry. She further contended that under order 50 Rule 6 of the Civil Procedure Rules the Court has unfettered discretion to enlarge time. She submitted that the claimant will suffer no prejudice if the orders sought will be granted. She relied on *Edith Gichugu Koine Vs Stephen Njagi Thoithi [2014]eKLR* and *Nicholas Kiptoo Arap Korir Salat Vs The Independent Electoral and Boundaries Commission & 7 Others [2014]eKLR*.

6. The claimant submitted that the respondent was served with summons and the statement of claim on 4.7.2017 as per the Affidavit of Service dated 26.1.2018. That for 3 years the applicant sat on her right to file defence and thereafter failed to respond to invitations to attend court to take mention date. That when the suit came up for pretrial the respondent made an oral application for leave to file defence out of time but the application was declined due to the undue delay of 3 years, and the court directed the suit to be heard as undefended by formal proof.

7. The claimant further submitted that the respondent filed application dated 27.11.2018 seeking leave to file defence out of time but he (claimant) filed a Preliminary Objection dated 5.12.2018 and again the Court declined the application. He submitted that the present motion dated 18.12.2018 should also be declined because this Court lack jurisdiction to grant leave to appeal out of time. In his view, such jurisdiction is bestowed upon the Court of Appeal.

8. As regards the order of stay, of the impugned order, the claimant contended that granting the same would delay justice. As regards the order for reconstruction of the Court file, the Claimant contended that the file is not lost and that request is overtaken by events. He concluded by contending that the application is a waste of time and contended that equity does not aid the indolent but the vigilant. He relief on *Hedwig – Hrt Mitterlerhner Ulrich Vs Jemdrod Spin [2016]eKLR* and *Pelican Engineering & Constructions Co. Ltd Vs Nairobi Golf Hotels (Kenya) Ltd [1997]eKLR* to argue his case.

Analysis and determination

9. There is no dispute that the Court directed the suit herein to proceed as undefended by way of Formal Proof. The issues for determination are:-

(a) Whether the leave should issue to the applicant to file Notice of Appeal out of time.

(b) Whether the order dated 22.11.2018 should be stayed.

(a) Leave Order

10. The Notice of Appeal dated 10.12.2018 challenges the order of the Court made on 21.11.2018 and 6.12.2018. On 21.11.2018, the suit came up in Court for pre-trial conference under Rule 15 of the ELRC Procedure Rules and the Claimant prayed for directions that the suit proceeds as undefended by way of Formal Proof because no defence had been filed by then. In response Mr. Chege Advocate holding brief for the defence counsel casually prayed for leave to file and serve defence, supporting documents and witness statements. The Court considered the merits of the leave sought and found that no good grounds were shown for the delay in filing the said documents within the prescribed time and declined the request, on merits and granted the directions sought by the Claimant.

11. The respondent never appealed against the said orders and instead repeated the same application by the Notices of Motion dated 27.11.2018 but the claimant objected to the same by the Notice of Preliminary Objection dated 5.12.2018. After considering the application and the claimants Preliminary Objection, I summarily dismissed the application because it was *res judicata* with respect to the oral application made on 21.11.2018 for similar orders, which had been determined on the merits.

12. The order made on 6.12.2018 was therefore not the one by which the Court gave directions to have the suit proceed by Formal Proof as an undefended suit. The correct order by which the said directions were given was made on 21.11.2018 when the suit came up for such directions under Rule 15 of the ELRC Procedure Rules.

13. Rule 15 provides that:

“(1) The parties to a suit shall within 14 days after the close of pleadings or such other period as the Court on application may direct, move the Court to hold a scheduling conference to ascertain...

(3) Where no defence or response is filed within the prescribed period, the Court may, upon application by the claimant, direct the matter to proceed for Formal Proof.”

14. The reason given for failure by the applicant to file Notice of Appeal against the impugned direction given that the suit proceeded for formal proof, was that the Court file could not be traced at the registry. That was not a valid reason for the default to file the intended Notice of Appeal. Rule 75(2) of the Court of Appeal Rules provide that:-

“(2) Every such notice shall, subject to Rule 84 and 92 be lodged within fourteen days of the date of the decision against which it is desired to appeal.”

15. In this case, it is clear that from 21.11.2018 when the impugned directions were made to 10.12.2018 when the Notice of Appeal was drawn was 19 days. The fourteen days window provided for filing such notice closed on 5.12.2018 before the alleged disappearance of the Court file from the Court registry. The foregoing is supported by the fact that the file was in the registry on 5.12.2018 when the Preliminary Objection was filed and again in Court on 6.12.2018 when the Court summarily declined the respondents application dated 27.11.2018.

16. As regards the intended appeal against the order dated 6.12.2018 declining the application dated 27.11.2018, the Court finds no good reason as to why the respondent failed to file the Notice of Appeal. She drew the Notice of Appeal on 10.12.2018 but failed to lodge it as required by Rule 75 (1) of the Court of Appeal Rules. The allegation that the court file had disappeared is not true because on 18.12.2018, she filed the present application. From 6.12.2018 to 18.12.2018 was 13 days. The application for leave was therefore prematurely filed with respect to the orders made on 6.12.2018

17. In view of the foregoing, I find that it was deliberate on the part of the applicant and her counsel not to exercise the right of appeal within the prescribed time under the rules and not because the Court file had disappeared. I therefore find that the application for leave to file the Notice of Appeal out of time lacking merits and decline to exercise my discretion in favour of the applicant. Even if the Court enjoys wide discretion, the relief sought is equitable and equity does not aid the indolent. Without judging the applicant harshly, I am of considered view that her failure to file defence on time and further failing to file Notice of Appeal on time means that she is not conscious and does not appreciate the overriding objective of this Court’s mandate as set out under section 3(1) of the ELRC Act being expeditious, efficient and proportionate resolution of disputes governed by the said Act.

18. The applicant is not alone in failing to appreciate the said principal objective of the said Act. Since I was posted to the Nairobi station in February 2018, I found that the respondents in almost all suits filed do not file defence within the prescribed time and the few who file they do not file witness statements or supporting documents as required by the rules. I have had to push unwilling respondents to comply with the rules of Procedure but almost in vain. It is very common to see a respondent seeking leave to file defence either during the pre-trial conference or on the day of Formal Proof. As a result, there is backlog of cases in Nairobi Station which is not warranted and which can be avoided by keeping to strict timelines in filing of pleadings and supporting documents within the prescribed time.

(b) Stay of Execution

19. In view of the foregoing refusal to grant the leave to appeal of time, I see no just reason to warrant the order for stay of the directions that the suit proceeds for formal proof. In any case, the application seeks for stay of order dated 22.11.2018 which is nonexistence.

(c) Reconstructions of the Court File

20. The court file has not disappeared and it is indeed the one in which the application was filed and prosecuted. I therefore decline the said order for reconstruction.

Conclusion and disposition

21. I have found that the failure to file Notice of Appeal within the prescribed period, to challenge the order made on 21.11.2018 was not due to the disappearance of the Court file because as at 5.12.2018 when the prescribed period lapsed, the Court file was available in the Registry. Likewise, I have found that the failure to file Notice of Appeal against the order made on 6.12.2018 was also not due to disappearance of the Court file because as 18.12.2018 when she filed the present application in the said file, the 14 days' time within which to file the Notice of Appeal had not yet lapsed. Finally, I have found no merits in the application for stay of the order dated 22.11.2018 and for reconstruction of the Court file. Consequently I dismiss the Notice of Motion dated 18.12.2018 with costs.

Dated, Signed and Delivered in Open Court at Nairobi this 14th day of June, 2019.

ONESMUS N. MAKAU

JUDGE